As regards the applicant's allegation that the affidavit of Datuk Polycarp Sim Cheng Mong being 'a worthless substitute for a proper affidavit of service of the documents in question by the person/persons who allegedly served them on me', I do not consider the allegation to be relevant as the applicant himself admitted receipt of DPS-1 after Christmas (see para 7 of his affidavit in reply dated 3 July 1989).

Next, the applicant did not account for the delay in filing the application and therefore there is nothing for me to consider on the issue of delay.

Mr Thomas orally applied for extension of time under O 3 if the court were to rule against the applicant on the delay. On this issue, it is appropriate for me to quote the judgment of the Federal Court in the case of *Ravindran* v *Malaysian Examinations Council*[2] where at p 169 Hashim Yeop A Sani FJ (as he then was) said:

> The meat of the complaint of the appellant is contained in para 14 of his affidavit (p 9) supporting his application for leave which affidavit also purported to apply for an enlargement of time. It is clear that the application for an enlargement of time was not made in a proper manner as the application in the notice of motion was for leave to apply for an order of certiorari. The application in the notice of motion, itself being out of time, was therefore not properly before the court.

It is clear, in my view, that the oral application of Mr Thomas could not be entertained by the court.

As a result the applicant was without the time prescribed in O 53 r 1A and the delay was not accounted for and the extension of time was not made in a proper manner. The court accordingly had no jurisdiction to grant leave. According to Hashim Yeop A Sani FJ (as he then was) in *Ravindran*'s case:[2] 'Whether the application for an order of certiorari had merits or not was irrelevant.'

In the result, I allowed the preliminary objection of the respondent, as in the words of Hashim Yeop A Sani FJ (as he then was): 'There had been no jurisdiction to hear the application for certiorari because O 53 r 1A of the Rules of the High Court 1980 expressly directs that leave shall not be granted 'unless the application is made within six weeks after the date of the proceeding'.' The originating motion was accordingly dismissed with costs to be taxed unless agreed.

Application dismissed.

Solicitors: *TO Thomas & Co.*

Reported by *Zarinah Marican*

Ng Choon Mon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and another application

HIGH COURT (SEREMBAN) — CRIMINAL APPLICATION NOS 54-60 OF 1988 AND 54-61 OF 1988
MUSTAPHA HUSSAIN J
24 APRIL 1989

Preventive Detention — Habeas corpus — Whether Minister's clearance for further detention required — Whether Minister required to make regulations prescribing time period for submission of investigation report to inquiry officer — Effect of failure to make such regulations — Whether Advisory Board had power to recommend extension of original detention order — Grounds for original detention order differing from grounds for extension order — Effect of — Dangerous Drugs (Special Preventive Measures) Act 1985, s 11(1) & (4) — Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1985, ss 5(1)(b), 8(b) & 11A(1)(aa)

Both applicants were arrested and detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316') and the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1985 ('Act A629'). Their initial detention for two years was extended for a further two years. Both applicants applied for habeas corpus on the basis of six grounds:

(1) That on the basis of s 3(2)(c) of Act 316, the authorization for detaining for more than 14 days was without the approval and consent of the Minister as impliedly required by the law.

(2) That no specific officer was appointed to conduct the investigations and whether a complete report had been submitted to the inquiry officer and the Minister within a prescribed time period.

(3) That the inquiry officer failed to conduct his own independent inquiry to verify the report submitted to him under s 3(3) of Act 316 by the investigating officer; and the Minister had failed to make regulations for the time period for the inquiry officer to submit the reports under s 5(4) of Act 316.

(4) That the detention orders only stated that the applicants had been or were associated with trafficking in dangerous drugs and omitted to state the Minister's satisfaction that their detentions were necessary in the interest of public order.

(5) That the power of the advisory board under s 11(4) of Act 316 to report its opinion for extension was taken away by Act A629, leaving its function to review and report its opinions to two specific matters, ie whether the detention should cease or continue for the period remaining on the original detention.

(6) That s 11A(1) requires that the Minister, when extending the detention order, shall set out in the direction the grounds for the extension and state whether the grounds are the same, different, or partly the same as and partly different from, the grounds of the original detention order.

Held, allowing the applications and issuing writs of habeas corpus:

(1) The wording of s 3(2)(c) of Act 316 is clear. It merely states that the DSP shall forthwith report to the Minister but does not state that he is to obtain the Minister's clearance for further detention.

(2) Under the second ground, counsel contended that the submission of the complete report by the police officer of the

investigation to the inquiry officer and the Minister should be within such period as may be prescribed by the Minister by regulations made under the Act; no such regulations had been made. The court was of the view that the absence of the regulations prescribing the time period does not render s 3(3) of Act 316 void. Section 22(1) states 'may make regulations', and in the absence of the time period, the submission of the complete report must be made within a reasonable time. Further, the submission was well within the specified 60-day period under s 3(2).

(3) There need not be a specified named police officer to investigate as it cannot be expected that just one man would handle the investigation.

(4) The inquiry officer has the discretion whether to call witnesses in conducting his inquiry. The inquiry officer had stated in his affidavit that he was satisfied that the applicants were involved in trafficking dangerous drugs.

(5) The omission to include the objects or purposes for the detention in the alternative is a defect in form only and not of substance.

(6) The Advisory Board's power to review and give its opinion recommending an extension beyond the original two years did not exist at all when the amendment Act, Act A629, came into force. The Deputy Minister had, however, confirmed in his affidavit that he received the Advisory Board's report and after careful consideration of it, had ordered the extension of two years. This was well after Act A629 had come into force. The order of extension was therefore invalid as it was done in exercise of law that is non-existent.

(7) The grounds of the extension order are not the same as the grounds for the original detention order. While the original detention order was meant to prevent the applicants from acting or associating in any manner in activities relating to or involving the trafficking of dangerous drugs, the extension order was made as the Minister was satisfied that the detention was 'necessary in the interest of public order'. The latter ground covers a large spectrum of undesirable activities including drug trafficking and the applicants have to be informed of the reasons of their continued detention after two years.

(8) The defect is not the same as an omission to include the alternate ground. It is a substantial difference from the 'mencegah' [prevent from] ground, in meaning, context and purport, and is a legal defect.

[*Editorial Note*: The respondents have appealed to the Supreme Court vide Criminal Appeal Nos 05-28 of 1989 and 05-30 of 1989.]

Cases referred to

1 *Inspector-General of Police & Ors* v *Rajoo s/o Ramasamy* [1989] 1 MLJ 416 (folld)
2 *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 (folld) and (distd)
3 *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors* v *Datuk James Wong Kim Min* [1976] 2 MLJ 245 (folld)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(2)(c), 3(3), 5(2), (4), 6(1), 11(1), (4), 22(1)
Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1985 ss 5(1)(b), 8(b), 11(A)(1)(aa)

Gooi Hock Seng and *Athimulam* for the applicants.
Mohd Raus bin Sharif (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Mustapha Hussain J: These two habeas corpus applications are taken together as both involve the same points of law. There is no dispute as to facts.

The applicant, Ng Choon Mon, was arrested on 27 November 1985 at Bukit Tambun, Province Wellesley, and the applicant, Foo Fook Weng, was arrested on 16 August 1985 in Georgetown, Pulau Pinang. Both the applicants were arrested and detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 and the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1985. Both applicants were initially detained for two years and their detentions were extended for a further two years.

For clarity and ease of reference, the Dangerous Drugs (Special Preventive Measures) Act 1985, which came into force on 30 May 1985, is referred to as 'Act 316' and the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1985, which came into force on 18 December 1985, is referred to as 'Act A629'.

There were six grounds forwarded by the applicants seeking to render the detention orders, both the initial and the subsequent orders, illegal, unlawful, defective, bad in law, null and void. The applicants have also submitted for the court's consideration the Select Committee's Report DR 1 of 1985 which studied the Dangerous Drugs (Special Preventive Measures) Bill 1985.

The court has taken time to consider the various affidavits, the law, and the submissions and herewith are the findings ground by ground, and for ease of reference, the grounds are taken by their relevant sections of the law involved.

(1) *Section 3(2)(c) of Act 316*

It is the applicants contention that the authorization for detention for more than 14 days was without the approval and consent of the Minister as impliedly required by the law. It is contended, on behalf of the applicants, that under s 3(2)(c), the designated officer not only 'shall forthwith report the same (ie the circumstances of the arrest and detention) to the Minister' but the Minister must give his 'green light' for a further detention of more than 14 days.

Paragraph (c) of s 3(2) merely states that the DSP is to forthwith report to the Minister but does not state that he is to obtain the Minister's clearance for further detention. The wording is quite clear. There is no merit on this ground.

(2) *Section 3(3) of Act 316*

The applicants submitted that no specific police officer had been appointed to conduct the investigations and queried whether a complete report had been submitted to the inquiry officer and the Minister within the prescribed time period. It is also contended here that the requirement that submission of the complete report by the police officer of the investigation to the inquiry officer and the Minister should be 'within such period as may be prescribed by the Minister by *regulations* made under this Act', contravenes this subsection as there was no regulation made to this effect. The absence of the regulations prescribing the time period does not render s 3(3) void. Section 22(1) used the word 'may make regulations' and in the absence of the time period, the submission of the complete report must be made within a reasonable time. This has been done in our case. In any event, the specified period for investigation is 60 days (see s 3(2)) and the submission of the complete reports was well within this 60-day period. There need not be one specified named police officer to investigate. It cannot be expected that just one man can handle the investigation — the police have to work in teams. Anyway, the affidavit of Datuk Md Yassin clearly says that the investigation was done by the police. This ground, too, is without merit.

(3) *Section 5(2) and (4) of Act 316*

It was contended that the inquiry officer failed to conduct his own independent inquiry to verify the report submitted to him under s 3(3) by the investigation officer and that the Minister had failed to make regulations as to the time period for the inquiry officer to submit the reports under s 5(4).

The Supreme Court in the case *Inspector-General of Police & Ors* v *Rajoo s/o Ramasamy*[1] held that the inquiry officer has the discretion whether to call witnesses or not. In his affidavit, the inquiry officer said he was satisfied that the applicants were involved in trafficking dangerous drugs (see TS Sambanthamurti's affidavit) and it is the view of this court that he had indeed held an independent inquiry — there is no evidence otherwise. This ground too falls.

(4) *Section 6(1) of Act 316*

The detention orders only stated that the applicants had been or were associated with trafficking in dangerous drugs. The detention order omitted to state the Minister's satisfaction that their detentions *were necessary in the interest of public order.*

Karam Singh's case[2] is clear law that this omission to include the objects or purposes for the detention in the alternative, is a defect in form only and not of substance. There is no merit on this ground.

(5) *Section 11(1) and (4) of Act 316 as amended by ss 8(b) and 5(1)(b) of Act A629*

The power of the Advisory Board under s 11(4) to report its opinion for *extension* was taken away by the Amendment Act A629, leaving its function to review and report its opinions to two specific matters, ie whether the detention should cease or continue for the period remaining in the two years on the original detention.

Section 11(4) before being amended read as follows:

> Where the Advisory Board has reported that in its opinion the detention or restriction should continue *or be extended*, the Minister may continue *or extend* the detention or restriction of the person concerned.

'Continue' simply means to go ahead until the end of the two-year detention period. 'Extend' in simple language is to add on something extra going beyond the period originally fixed. This means that the review by the Advisory Board, which must sit not later than three months before the expiration of the two-year period (see s 11(1)), can either give its opinion to go ahead with the detention to its full duration of the remaining period of two years, or give its opinion to extend or add on a further period of detention beyond the period in the original detention order.

But those words '*or be extended*' and '*or extend*' were deleted by Act A629. Very clearly, the Advisory Board's power to review and give its opinion recommending an extension beyond the original two-year period did not exist at all when the Amendment Act A629 came into force.

The Amendment Act A629 came into force on 18 December 1985. The Advisory Board that sat and gave its opinion for extension sat on 13 September 1987 and reported to the Minister on 18 September 1987 (see affidavit of Encik Mokhtar bin Hj Sidin). The Deputy Minister, in his affidavit, confirmed that he received the Advisory Board's report on 29 September 1987 and after careful consideration of the Advisory Board's report, the Minister ordered the extension of two years. The affidavit of the Deputy Minister was affirmed on 22 November 1988.

It was obvious and very crystal clear that the Advisory Board, as long ago as 18 December 1985 (some three years), already had no power to give its opinion for extension. This is fatal. By a supplementary affidavit affirmed by the Deputy Minister on 16 February 1989, after the applicants' counsel had finished his submission in which this vital defect of an exercise of a law which is not in existence, was raised, the Deputy Minister stated that this decision to extend the detention was based on reports by the police and information relating to the conduct and activities of the applicants from the police.

Nothing in the supplementary affidavit by the Deputy Minister affirmed on 16 February 1989, after this vital

point was raised in submissions, said that his earlier affidavit affirmed on 22 November 1988, in particular paras 4 and 5 wherein the Deputy Minister stated that he had received a 'report from the Advisory Board on 29 September 1987 and that after considering the said report, ...', was not true or correct. Therefore, the Deputy Minister's first affidavit stands with all its truth and purport.

It is a basic rule of law that if there were two or more circumstances or two or more inferences and in this case, two affidavits, then the circumstances, the inference and the affidavit which had shown an invalid exercise of power and which is favourable to the applicants, must be taken in preference to the supplementary affidavit.

In any event, the supplementary affidavit by the Deputy Minister was filed after the submissions made by the applicants' counsel and without leave of the court, and rightly should not be admissible. It is akin to the close of hearing of a case and after submissions of one party and that party had brought up a fatal flaw in the other's case, the other party adduced further evidence. After all, the applications here are a trial by affidavit.

On this ground, the order of extension is invalid, as they were done in exercise of law that is non-existent.

(6) *Section 11A(1)(aa) of Act A629*

The amended s 11A(1) requires that the Minister, when extending the detention order,

> shall set out in the direction the grounds for the extension and state whether such grounds are
> (aa) the same as the grounds on which the order was originally made;
> (bb) different from the grounds on which the order was originally made; or
> (cc) partly the same ground and partly different grounds.

The grounds of the original order dated 21 January 1986 (and 10 October 1985 for the second applicant) read as follows:

> dengan tujuan mencegah beliau daripada melakukan apa-apa aktiviti yang berhubong dengan atau yang melibatkan pengedaran dadah berbahaya.

The grounds of the extension order dated 22 January 1988 (and 12 October 1987 for the second applicant) read as follows:

> Adalah perlu bagi kepentingan ketenteraman awam ...

Obviously, the grounds for the extension of the detention orders are not the same as the grounds of the original orders. One need not even be a lawyer to know this difference. The original detention order was meant to prevent the applicants from acting or associating in any manner in the activities relating to or involving with the trafficking in of dangerous drugs.

In the ground for the extension order, the applicants were detained on the Minister being satisfied that the detention was 'necessary in the interest of public order'.

Reading s 11A(1) again, it says:

> he shall set out in the direction the grounds for the extension and state whether such grounds are -
> (aa) *the same grounds on which the order was originally made;*

It is true the Minister in his supplementary affidavit stated that the extension was based on the many reports he has been given.

But this affidavit, even if admissible, does not detract from the fact that the grounds *are not the same*. It has been held, in many celebrated cases, that the detainee can take advantage of any defect of law or procedure made by the detaining authority. In the words of Lee Hun Hoe CJ (Borneo) in *Re Dato' James Wong Kim Min*,[3] the applicants are entitled to avail themselves of any technical defect which may invalidate the orders which deprive them of their liberty.

Clearly what we have here is more than a technical defect. Detention in the interest of public order covers a large spectrum of undesirables including subversives, foreign spies, nation wreckers, big-mouthed religious extremists and, of course, drugs and arms traffickers. Surely, the applicants have to be informed of the reasons for their continued detention after two years of them being '*prevented*' ('mencegah') from drug trafficking activities.

The defect here is not like the omission to include the alternate ground as in *Karam Singh*'s case.[2] Here, it is the view of this court, very substantial; very different from the original 'mencegah' ground, both in meaning, context and purport. It is a legal defect.

On this ground and the preceding ground, this court rules that the extension orders for a further period of two years dated 22 January 1988 and 12 October 1987 for the two applicants respectively here are not valid.

The two applications are therefore allowed. Writ of habeas corpus to issue and the two applicants to be brought to this court to be set free.

Applications allowed.

Solicitors: *Shan & Gooi.*

Reported by *Zarinah Marican*